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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

JOHN J. ROBERTSON; E. A. SMITH; SHERMAN E. SMITH; MAX B. SCHRIER; EVERETT N. MITCHELL; CHARLES V. DARNALL; WALTER E. DARNALL; LEWIS WOODARD and MAY WOODARD, his wife; BEN J. FUNK and LORA B. FUNK, his wife,
Appellees,

vs.

MARGARET LEMMON; PAULINE JACK; WILLIAM F. JACK and LENA CLAIRE JACK, his wife,
Appellants.

JURISDICTIONAL STATEMENT.

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Appellees,

vs.

MARGARET LEMMON; PAULINE JACK; WILLIAM F. JACK and LENA CLAIRE JACK, his wife,
Appellants.

JURISDICTIONAL STATEMENT.

OPINIONS BELOW.

The memorandum opinion of the trial judge of the District Court of Chautauqua County, Kansas, has not been reported but is set out in the appendix and marked Exhibit "A". The decision of the Supreme Court of the State of Kansas affirming this decision is reported in 189 Kansas Reports, 619. It is annexed hereto in the appendix and marked Exhibit "B".

GROUNDS ON WHICH JURISDICTION IS INVOKED.

1. ***The nature of the proceeding.*** **The plaintiffs in the court below were the holders of an oil and gas lease on the property in controversy and brought this action to determine who is entitled to the royalty from the oil produced from the property. The appellants, Margaret Lemmon, Pauline Jack, William F. Jack, and Lena Claire Jack, his wife, answered and claimed an undivided interest in the mineral rights in said property. The appellees, Ben J. Funk and Lora B. Funk, his wife, and Lewis Woodard and May Woodard, his wife, filed an answer claiming to own all of the mineral rights in said property under a sheriff's deed issued on the 15th day of May, 1954, in a tax foreclosure suit (a copy of said petition is set out in the appendix and marked Exhibit "C") brought against C. R. Ross and the Ross Oil Company. The appellants were not made parties to the tax foreclosure suit and had no notice thereof. Appellants' title to an interest in the mineral rights in said real property had been established in a suit brought to construe the will of their grandfather in the District Court of Chautauqua County, Kansas, which decision was affirmed by the Supreme Court of the State of Kansas on the 28th day of January, 1939, in the case of Jack v. Severns, 149 Kan. 229. (A copy of said decision is set out in the appendix and marked Exhibit "D").**

At a pre-trial conference the trial court held that the interest of appellants in said mineral rights were foreclosed, notwithstanding the fact that they were not made parties to the tax foreclosure proceeding and had

no notice of the same, and that the statutes of the State of Kansas in foreclosure actions, provides in Section 79-2801:

> "Said petition shall contain a description of each tract, lot or piece of real estate, subject to the provisions of this act, including, if in a city of the first or second class, the street number or location, and stating, as far as practicable, the amount of taxes, charges, interest and penalties, chargeable to each tract, lot or piece of real estate, and the name of the owner, supposed owner, and party having or claiming to have any interest therein or thereto, and giving the year such property was sold for delinquent taxes." (G.S. Kansas 1949)
>
> (This section is set out in full in appendix Exhibit "G")

The trial court held that this action was governed by Section 79-2804b of the general statutes of the State of Kansas. (This section is set out in full page 4) which provides in effect that legal or equitable actions or proceedings brought to open, vacate, modify or set aside any judgment rendered for taxes, interest and costs, or any order of sale, must be commenced within twelve months after the date the sale of the real estate which was affected by said judgment, order of sale, or sale was confirmed by the court. This decision was affirmed by the Supreme Court of the State of Kansas, and this appeal is from said decision.

2. *The decision sought to be reviewed* was handed down on the 5th day of May, 1962. Appellants' petition for a re-hearing was denied on June 13, 1962. The notice of appeal to this court was filed with the clerk of the Su-

preme Court of the State of Kansas on July 26, 1962. Appellants' motion for an order enlarging the time for docketing said appeal was granted by Hon. Jay S. Parker, Chief Justice of the Supreme Court of the State of Kansas, on August 28, 1962, and appellants given to December 23, 1962, to docket said cause in the Supreme Court of the United States.

3. *The statutory provision believed to confer on this Court jurisdiction* of the appeal is 28 U.S.C. Sec. 1257(2).

4. *Cases believed to sustain the jurisdiction*: Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, *Walker v. City of Hutchinson,* 352 US 112 (the legal questions involved in this case are the same as those decided by this court in these cases); *Murrison v. Fenstermacher,* 166 Kan. 569, 203 P. 2d 160.

5. *Validity of state statute involved.* General Statutes of Kansas, 1949, Section 79-2804b: "Legal or equitable actions or proceedings may be brought to open, vacate, modify or set aside any judgment rendered for taxes, interest and costs or any order of sale made under the provisions of section 79-2803 of the General Statutes Supplement of 1947 or amendments thereto, or any sale made under the provisions of section 79-2804 of the General Statutes Supplement of 1947 or any amendments thereof, but every such action or proceeding, including those brought to set aside judgments on the grounds and in the manner prescribed by the code of civil procedure, must be commenced within twelve months after the date the sale of

the real estate, which was affected by such judgment, order of sale or sale, was confirmed by the court. The time limitation herein fixed for the bringing of any such action or proceeding shall be construed as a condition precedent to the bringing of any such action or proceeding and shall not be construed as a statute of limitations. The petition in every such action or proceeding shall show that such action or proceeding was commenced within the time herein limited. If any such action or proceeding is not commenced within the time herein limited, or if the petition in any such action or proceeding shall not show that such action or proceeding was so commenced, the court shall have no jurisdiction of such action or proceeding. The provisions of this section shall apply to all judgments, orders of sale and sales whether the purchaser at the foreclosure sale be the county or an individual."

QUESTIONS PRESENTED.

(A) Whether a state law, to-wit: G.S. 1949 (Kansas) Section 79-2804b and proceedings re tax foreclosure, constitute due process of law where no service of summons or notice of the foreclosure suit was given to these appellants.

(B) Whether Section 79-2804b, G.S. 1949 (Kansas), as construed by the Supreme Court of the State of Kansas, to the effect that in a tax foreclosure suit it is unnecessary to give notice of said foreclosure suit to the appellants, who are the owners of an interest therein, as determined by the Supreme Court of the State of Kansas (See Jack v. Severns, 149 Kan. 229, 86 P. 2d 514, Appendix Ex. D.),

is repugnant to the due process clause of the 14th amendment of the Constitution of the United States.

(C) Whether the procedure adopted in this case, whereby appellants' interest in the real property involved was held to have been extinguished in a tax foreclosure suit in which they were not made parties and had no notice thereof, took appellants property without due process of law and in violation of the Constitution of the United States.

STATEMENT OF THE CASE.

Plaintiffs, the owners of an oil and gas lease upon the real property in controversy, brought this suit in the District Court of Chautauqua County, Kansas, to determine who was entitled to the royalty from the oil produced from the property. The defendants, Margaret Lemmon, Pauline Jack, William F. Jack and Lena Claire Jack, his wife, hereinafter referred to as appellants, filed an answer in this action, claiming that they each owned an undivided interest in the mineral rights in and to said property and were entitled to a part of the royalty. The defendants, Ben J. Funk and wife, hereinafter referred to as appellees, filed an answer, claiming all of the mineral interest in said real property by virtue of a sheriff's deed issued in a tax foreclosure suit instituted by the Board of County Commissioners of Chautauqua County, Kansas, in 1953 against C. R. Ross and the Ross Oil Company, and that under the sale and sheriff's deed issued in that action, they were entitled to all of the royalty.

Lewis Woodard and May Woodard, his wife, hereinafter referred to as appellees, defendants in the court below, filed an answer in which they allege:

"6. That on the 24th day of May, 1954, by a quit claim deed recorded in Book 67 of Deeds at Page 170, Ben J. Funk and Lora Funk, his wife, conveyed to Lewis Woodard and May Woodard, his wife, these defendants, an undivided one-half interest in and to the minerals in place in the southwest quarter of the southeast quarter of Section 7, Township 35 South, Range 12 East, and that by reason thereof, these answering defendants are the owners of an undivided one-half interest in the minerals in and under the southwest quarter of the southeast quarter of Section 7, Township 35 South, Range 12 East and are therefore entitled to a one-half of the landowners one-eighth royalty under and by virtue of the oil and gas leases consisting and covering the above described real estate." (C.A. 3)

"Further answering these defendants allege that W. F. Lemmon and Mattie E. Lemmon, his wife, were the owners of the South Half of the Southeast Quarter in said Section 7, and by warranty deed conveyed the same to Thomas E. Stricklin on May 21st, 1928, and by said deed reserved to W. F. Lemmon all oil, gas and other mineral substances on, in or under said land or any part thereof, forever, with full right to operate for said minerals; that the said W. F. Lemmon was the owner of said oil, gas and other minerals in and under said real estate at the time of his death.

"3. That under the Last Will and Testament of the said W. F. Lemmon, he provided as follows: '(6) I hereby give, devise and bequeath to Mrs. B. L. Brockman, my daughter; W. F. Jack, my son-in-law; Reece H. Lemmon, my son; and George J. Lemmon, my son, share and share alike, all of the real estate I own in fee at my death, which is situated in Chautauqua County, Kansas.'

"'(7) All the balance of my property, not heretofore disposed of, which I may own at the time of my death, real, personal and mixed, wherever situated, and of every kind and character, I hereby give, grant, devise and bequeath as follows, to-wit:

"To Mrs. B. L. Brockman, my daughter, 1/5th of all such property.

"To my son, Rees H. Lemmon, 1/5th of all such property.

"To my son, George J. Lemmon, 1/10th of all such property.

"To Margaret Lemmon, wife of George J. Lemmon, a 1/10th of all such property.

"To George Armour Jack, Pauline Jack and William F. Jack, the three children of my deceased daughter, Ermie L. Jack, 1/15th interest each of all such property.

"To G. W. Jack, husband of my deceased daughter, Ermie L. Jack, a 1/5th of all such property.'

"4. That by a warranty deed dated May 25th, 1936, and recorded in Book 55 of Deeds at Page 254, in the Office of the Register of Deeds of Chautauqua County, Kansas, W. G. Lemmon, Beatrice L. Rose, nee Brockman and J. G. Rose, her husband. Lorene Lemmon, wife of

Rees H. Lemmon conveyed their interest in the South Half of the Southeast quarter of Section 7, to C. R. Ross. There is no conveyance from William F. Jack or the children of W. G. Jack.

"5. These defendants further allege that by proceedings in Case No. 6750, in the District Court of Chautauqua County, Kansas, the Board of County Commissioners of Chautauqua County, Kansas, filed a tax foreclosure action against C. R. Ross and the Ross Oil & Gas Company and that by Causes of Action No. 84 and 85, of the Petition, the tax lien upon the oil, gas and other mineral rights belonging to C. R. Ross and the Ross Oil & Gas Company was foreclosed and that Cause of Action No. 84, applies to the land in question in this action; that William F. Jack was not made a party to the action; that at the Sheriff's sale under said proceedings, the mineral interest of the South Half of the Southeast Quarter of Section 7, Township 35 South, Range 12 East of the 6th P.M., was sold to Ben J. Funk and that said sale was confirmed and a Sheriff's Deed was made, executed and delivered to Ben J. Funk, said deed being dated May 15th, 1954, and being recorded in Book 64 of Deeds at Page 69, in the Office of the Register of Deeds of Chautauqua County, Kansas; that by said deed the full mineral interest in the south half of the southeast quarter of Section 7, Township 35 South, Range 12 East was conveyed to Ben J. Funk." (A. 3, 4, and 5).

The said Lewis Woodard and May Woodard, his wife, claimed to be entitled to an undivided one-half interest in and to said royalty under a deed from Ben J. Funk and wife.

A pre-trial conference was had before the judge of the District Court of Chautauqua County, Kansas. At this pre-trial conference, the attention of the trial court was directed to the fact that appellants' title to this property had been established in this court in the case of Jack, et al. v. Severns, et al., and the decision of the trial court had been affirmed by the Supreme Court of the State of Kansas in the case of Jack v. Severns, reported in 149 Kan. at Page 229. That Section 79-2801, General Statutes of the State of Kansas, 1949, provides, in actions to foreclose tax liens, specifically that the petition in such foreclosure action *shall* contain a description of each tract, lot, or piece of real estate; the name of the *owner*, supposed owner, and party having or claiming to have any interest therein or thereto and giving the year such property was sold for delinquent taxes, and that service of summons should be had the same as in other civil cases. That the appellants were not made parties to this tax foreclosure suit and had no notice thereof.

The appellees claimed in substance that under the provisions of Section 79-2804b (General Statutes of Kansas, 1949), one year only is provided to set aside any judgment rendered in tax foreclosure suits or proceedings, and that under this statute, appellants' interest in this property has been foreclosed and sold, and it is immaterial whether they were made parties to the original tax foreclosure proceeding or not, and after the lapse of one year, the title conferred by the sale in the tax foreclosure suit became final.

Appellants replied that the legislature of the State of Kansas had provided for an adversary proceeding in tax

foreclosure suits (Section 79-2801, G.S. 1949, Appendix Ex. G), and that Section 79-2804b, G.S. of Kansas, 1949, (providing that judgments in tax foreclosure proceedings could be set aside only within one year) applied only to judgments as to parties to the suit over which the court had obtained jurisdiction, and if it be held to apply to persons who where not parties to the suit and over whom the court had no jurisdiction, that such a ruling would prevent appellants and persons similarly situated from setting up the defense that the tax had been paid, or any other defense that they might have to the tax foreclosure suit, and that said statute, if so construed, would be in violation of the 14th amendment to the United States' Constitution.

The trial court held that the tax foreclosure suit extinguished appellants' mineral rights. In his memorandum opinion, the trial judge says:

> "It is the opinion of the court that the determination of one question fully disposes of the case and that the consideration of other questions presented is not necessary. The particular question involved is whether the interests of defendants Pauline Jack, William F. Jack and Margaret Lemmon were extinguished by the sale of the mineral rights involved under the tax foreclosure proceedings stipulated to as having taken place at the time and in the manner stated into the record. It is the opinion of the court that the interests of the said defendants were extinguished. * * * I do not believe that this decision is violative of the due process provisions of the constitution."

Decision set out at Ex. "A" Appendix.

At the time the tax foreclosure suit was instituted in the District Court of Chautauqua County, Kansas, on September 28, 1953, there was of record in said District Court the petition of appellants, Pauline Jack and William F. Jack, and their father, W. G. Jack, which set forth the residence of Pauline Jack as being at St. Joseph Hospital, Booneville, Missouri, the residence of William F. Jack, as 1529 Kentucky, Lawrence, Kansas, and the residence of W. G. Jack, as Caney, Kansas (see Exhibit "E" set out in the appendix). There was also of record in said court the decision of the Supreme Court of the State of Kansas, affirming the construction of said will, the same being Jack v. Severns, 149 Kan. 229. In addition thereto, the will of W. F. Lemmon, which left a portion of the mineral rights in this property to the appellants was of record in the Probate Court of Chautauqua County, Kansas (See Exhibit "F" set out in the appendix).

From the decision of the District Court of Chautauqua County, an appeal was taken to the Supreme Court of the State of Kansas, and one of the specifications of error was "The trial court erred: (3) In failing and refusing to hold that the procedure adopted in the tax foreclosure proceeding deprived the appellants of their property without due process of law." The Supreme Court of the State of Kansas affirmed this decision (See Exhibit "B" set out in the appendix), holding that appellants' mineral interest in the property was extinguished by the tax foreclosure proceeding, and that it was not necessary to make appellants parties to such proceeding or to serve them

with notice of the tax foreclosure suit. The court says in the syllabus:

> "The provisions of G.S. 1949, 79-2804b, limit the time for challenging a tax foreclosure judgment to twelve months after the date the sale of the real estate was confirmed even though the parties challenging the proceedings were not named in the petition or publication notice.
>
> "The provisions of G.S. 1949, 79-2804b, do not violate the due process clause of the Federal Constitution nor Section 2 of the Kansas Bill of Rights."

At Page 626 of the opinion the court says: "Based on what has been heretofore stated and held we conclude that neither the due process clause of the Federal Constitution nor Section 2 of the Kansas Bill of Rights was violated by the provisions of G.S. 1949, 79-2804b, limiting the time for challenging a tax foreclosure judgment to twelve months after the date the sale of the real estate was confirmed, even though the parties challenging the proceedings were not named in the petition or publication notice."

SUBSTANTIALITY OF FEDERAL QUESTIONS.

These facts are undisputed:

(1) That appellants were not parties to the tax foreclosure suit through which appellees claim title to the property in dispute. (See petition in tax foreclosure suit, Appendix Exhibit No. "C").

(2) Since appellants were not made parties to the suit, no service of summons was had upon them in this tax foreclosure suit, and they had no notice of the same.

(3) That appellants' title to the mineral interest in the real property involved in this action had been established in a suit brought in the same court in which the tax foreclosure suit was brought, and such decision was affirmed by the Supreme Court of the State of Kansas. (See Jack v. Severns set out in Appendix Exhibit No. "D").

(4) That the petition filed in the case of Jack v. Severns sets out the residence and post office address of William F. Jack, one of the appellants, as 1529 Kentucky Street, Lawrence, Kansas, and Pauline Jack, one of the appellants, as St. Joseph Hospital, Booneville, Missouri, and W. G. Jack (now deceased) as Caney, Kansas. This suit was a part of the records of the District Court of Chautauqua County, Kansas, at the time the tax foreclosure suit was filed. (See Appendix, Exhibit No. "E").

(5) That the will of William Lemmon, who owned all of the mineral interest in this property at the time of his death, was on file in the Probate Court of Chautauqua County, Kansas, at the time the foreclosure suit was filed, this being the will that was construed in the case of Jack v. Severns, 149 Kan. 229. That by the terms of this will, appellants were devised and bequeathed an interest in the mineral rights in this property, and an examination of the Probate Court records such as would have been made by any abstracter or other person making a search of the records to ascertain the owners of this property would have disclosed the title of these appellants in and to the same. (See Exhibit No. "F" in the Appendix).

(6) That the statutes of Kansas provide that the petition in a tax foreclosure suit *shall* set out a description of the property, the name of the owner, and that service of summons shall be had upon the defendants the same as in other civil cases. (See Appendix, Exhibit No. "G"). There is no provision in the Kansas statutes for service by publication where the defendant is a resident of the state, and such residence is known, or with due diligence can be ascertained by the plaintiff. The Kansas statute (G.S. 1949) for service by publication provides: Section 60-2525: "Service may be made by publication in either of the following cases: * * * In all actions which relate to or the subject of which is real or personal property in this State, where any defendants has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly or partly in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation."

Section 60-2526 provides: "Before service by publication can be made, an affidavit must be filed, stating the residence, if known, of the defendant or defendants sought to be served, and if not known, stating that the plaintiff has diligently inquired as to the residence of such defendant or defendants and has been unable to learn the place of such residence and that the plaintiff is unable to procure actual service of summons on such defendant or defendants within this state, and showing that the case is one of those mentioned in the preceding section."

It is elementary law that in order to have a valid judgment, the court must have jurisdiction of the property, (res) and also jurisdiction over the person whose rights

are affected by the judgment. The Kansas courts, by this decision, have made an exception to this rule in tax foreclosure cases. They say that jurisdiction over the person in such a suit is not essential, and that his property can be taken without notice to him and without making him a party to the tax foreclosure suit. This decision is based upon the erroneous assumption that the due process clause of the United States Constitution does not apply to suits in rem, and the court holds that this is a suit in rem, and that it is not necessary to give the owner of property notice of a tax foreclosure suit, nor make him a party to the same. The fact that this is contrary to the express language of the Kansas statutes which make it mandatory for the petition to set out the name of the owner and to secure service of summons upon him is ignored. (See Section 79-2801, G.S. 1949, Kansas, Appendix, Exhibit No. "G"). That the due process clause of the constitution applies to proceedings in rem, and that a party is entitled to notice of a proceeding in which his interests are being adjudicated, whether it be called an action in rem or an action in personam was held in Mullane v. Central Hanover Bank and Trust Company, 339 US 306 (1950), where the court says:

> "Distinctions between actions in rem and those in personam are ancient and originally expressed in procedural terms what seems really to have been a distinction in the snbstantive law of property under a system quite unlike our own. Buckland and McNair, Roman Law and Common Law, 66; Burdick, principles of Roman Law and Their Relation to Modern Law, 298. The legal recognition and rise in economic importance of incorporeal or intangible forms of property have upset the ancient simplicity of prop-

erty law and the clarity of its distinctions, while new forms of proceedings have confused the old procedural classification. American courts have sometimes classed certain actions as in rem because personal service of process was not required, and at other times have held personal service of process not required because the action was in rem. See cases collected in Freeman on Judgments Paragraphs 15-17 et. seq., 5th ed.

"Judicial proceedings to settle fiduciary accounts have been sometimes termed in rem, or more indefinitely quasi in rem, or more vaguely still 'in the nature of a proceeding in rem.' It is not readily apparent how the courts of New York did or would classify the present proceeding, which has some characteristics and is wanting in some features of proceedings both in rem and in personam. But in any event we think that the requirements of the Fourteenth Amendment to the Federal Constitution do not depend upon a classification for which the standards are so elusive and confused generally and which, being primarily for state courts to define, may and do vary from state to state. Without disparaging the usefulness of distinctions between actions in rem and those in personam in many branches of law, or on other issues, or the reasoning which underlies them, we do not rest the power of the State to resort to constructive service in this proceeding upon how its courts or this Court may regard this historic antithesis. It is sufficient to observe that, whatever the technical definition of its chosen procedure, the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard.

"Quite different from the question of a state's power to discharge trustees is that of the opportunity it must give beneficiaries to contest. Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.

"In two ways this proceeding does or may deprive beneficiaries of property. It may cut off their rights to have the trustee answer for negligent or illegal impairments of their interests. Also, their interests are presumably subject to diminution in the proceeding by allowance of fees and expenses to one who, in their names but without their knowledge, may conduct a fruitless or uncompensatory contest. Certainly the proceeding is one in which they may be deprived of property rights and hence notice and hearing must measure up to the standards of due process.

"Personal service of written notice within the jurisdiction is the classic form of notice always adequate in any type of proceeding. But the vital interest of the State in bringing any issues as to its fiduciaries to a final settlement can be served only if interests or claims of individuals who are outside of the State can somehow be determined. A construction of the Due Process Clause which would place impossible or impractical obstacles in the way could not be justified.

"Against this interest of the State we must balance the individual interest sought to be protected by the Fourteenth Amendment. This is defined by our holding that 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 US 385, 394, 58 L ed 1363, 34 S Ct 779. This right to be heard has little reality or worth unless one is informed that the matter is pending and

can choose for himself whether to appear or default, acquiesce or contest.

"The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized or what test it must meet. Personal service has not in all circumstances been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. No decision constitutes a controlling or even a very illuminating precedent for the case before us. But a few general principles stand out in the books.

"An elementary and fundamental requirement of the due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 US 457, 85 L ed 278, 61 S Ct 339, 132 ALR 1357; Grannis v. Ordean, 234 US 385, 58 L ed 1363, 34 S Ct 779; Priest v. Las Vegas, 232 US 604, 58 L ed 751, 34 S Ct 443; Roller v. Holly, 176 US 398, 44 L ed 520, 20 S Ct 410. The notice must be of such nature as reasonably to convey the required information. Grannis v. Ordean, 234 US 385, 58 L ed 1363, 34 S Ct 779, supra, and it must afford a reasonable time for those interested to make their appearance. Roller v. Holly, 176 US 398, 44 L ed 520, 20 S Ct 410, supra, and cf. Goodrich v. Ferris, 214 US 71, 53 L ed 914, 29 S Ct 580. But if with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, the constitutional requirements are satisfied. 'The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having reference to the subject with which the statute deals.' American Land Co. v. Zeiss, 219 US 47, 67, 55 L

ed 82, 97, 31 S Ct 200; and see Blinn v. Nelson, 222 US 1, 7, 56 L ed 65, 68, 32 S Ct 1, Ann Cas 1913B 555.

"But when notice is a person's due, process which is a mere gesture is not due proces. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, compare Hess v. Pawloski, 274 US 352, 71 L ed 1091, 47 S Ct 632, with Wuchter v. Pizzutti, 276 US 13, 72 L ed 446, 48 S Ct 259, 57 ALR 1230, or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.

"It would be idle to pretend that publication alone as prescribed here, is a reliable means of acquainting interested parties of the fact that their rights are before the courts. It is not an accident that the greater number of cases reaching this Court on the question of adequacy of notice have been concerned with actions founded on process constructively served through local newspapers. Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention. In weighing its sufficiency on the basis of equivalence with actual notice we are unable to regard this as more than a feint."

The above case was cited with approval and followed in the case of Walker v. City of Hutchinson, 352 US 112 (1956), where the court says:

> "It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co., 339 US 306, 94 L ed 865, 70 S Ct 652, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.
>
> "Measured by the principles stated in the Mullane Case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value.
>
> "Nothing in our prior decisions requires a holding that newspaper publication under the circumstances

here provides adequate notice of a hearing to determine compensation. The State relies primarily on Huling v. Kaw Valley R. & Improv. Co., 130 US 559, 32 L ed 1045, 9 S Ct 603. We think that reliance is misplaced. Decided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the landowner was a nonresident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision.

"There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use."

The legal principles set forth in these decisions are controlling in this case. These appellants were not notified of the tax foreclosure suit and had no opportunity to present the defense that the taxes had in fact been paid, or any other defense that they might have. There are many decisions in the Kansas Reports involving tax foreclosure cases where the tax has been paid and where the county officials have either fraudulently or inadvertenly included such property in the tax foreclosure suits.

Prior to 1956 the rule in Kansas was "That a tax must actually be due and unpaid before real estate can be

sold for taxes is a prerequisite essential to fair-dealing between its sovereign and its citizens." (Shell Oil Company v. Board of County Commissioners—two cases—165 Kan. 642, 197 P. 2d 925). To the same effect is Magonlia Petroleum Co. v. Moyle, 162 Kan. 133, 175 P. 2d 133; Magnolia Petroleum Co. v. Moyle, 163 Kan. 368, 182 P. 2d 127; and Board of County Commissioners v. Allen, 175 Kan. 460, 264 P. 2d 916. In all of these cases, the taxes had been paid. In the Shell Oil Company case, the court sets out the facts at Pages 643 to 645 of the opinion as follows:

> "Some of the salient facts alleged in the verified amended petition in case No. 37,262 in substance were: The petroleum corporation was a defendant in the tax foreclosure action; the journal entry of judgment in that action disclosed the owner and party claiming the mineral interest involved was the petroleum corporation; the oil company, formerly the petroleum corporation, a foreign corporation, was authorized to do business in this state; at all times during its existence in this state petitioner, had a service agent appointed in this state, as required by law, upon whom personal service could be had and service could likewise have been had on the secretary of state; the tax foreclosure action was filed on March 19, 1942; the oil company, formerly the petroleum corporation, on that date and for many years prior thereto had been the owner of the undivided mineral interest involved; there were no delinquent taxes on that mineral interest on March 19, 1942; the petitioner had at all times paid the taxes in full; the records of the county treasurer of Grant county disclosed there were no delinquent taxes on 'said land' on March 19, 1942; notwithstanding defendants' knowledge that no tax lien existed against 'said land' the defendants, W. P. Wesley, county attorney, and H. W. Stubbs, as agents and attorneys for the defendant board of county commis-

sioners, instituted the action seeking to foreclose alleged tax liens; the mineral interest and many other properties were sold on July 26 and 28 and the sales were confirmed August 5, 1942; the alleged unpaid tax on the mineral interest was $3.57; the costs were $4; the market value of the mineral interest on March 19, 1942, was $6,000; the mineral interest was purchased at sheriff's sale for the grossly inadequate and unconscionable sum of $20 by H. W. Stubbs; the county attorney and H. W. Stubbs as agents and attorneys for the board of county commissioners, instituted the tax foreclosure action for Grant county; in that action the county attorney and H. W. Stubbs acted as governmental agents and representatives of the tax payers and the general public; although petitioner had a resident agent in this state, as required by law, upon whom personal service might have been had and although personal service likewise might have been had on the secretary of state service was nevertheless obtained by publication only; the publication service was approved by the district court by reason of an affidavit filed by the county attorney in which it was knowingly and falsely stated that personal service could not be on the petitioner in the instant case in this state; that defendants conspired to fraudulently deprive petitioner of its title to the mineral interest involved; the petitioner had no actual notice of the foreclosure action and the fraud of the defendants until April 1, 1944; until that date this petitioner had relied on its record title, returned the same for taxes each and every year and had paid all taxes assessed against it; had this petitioner had notice of the foreclosure action it could, and would, have shown the court it was the lawful owner of said land free and clear of any alleged tax liens.

"It is conceded the allegations in Case No. 37,263 were substantially the same except the petition in that case, in substance, further stated: The alleged unpaid tax on that mineral interest was $3.27; the

mineral interest was purchased at sheriff's sale by C. L. Dew, a member of the board of county commissioners for the inadequate and unconscionable sum of $10; the market value of 'said land' on March 19, 1942, was $6,000."

In 1956, the Kansas court specifically overruled these cases and held in Phillips Petroleum Company v. Moore, 179 Kan. 482, (This is another case where the tax had in fact been paid), 297 P. 2d 183, that if the county attorney committed perjury in his affidavit to obtain service of summons on a defendant by publication, and even if the tax on the property had been paid the property owner was helpless after a year had expired. In the opinion in this case, the court says:

"Personal service of summons was not had upon Phillips. Thereafter, and upon the affidavit of the county attorney, service by publication was obtained on Phillips, which was approved by the district court. On September 16, 1943, no appearance having been made by Phillips, the district court upon due consideration, rendered judgment for the plaintiff foreclosing its tax lien upon the property in question. On September 27, 1943, the District Court issued an order for the sale of the real estate. Notice of the sale was given, and at the sheriff's sale held on November 10, 1943, the real estate was sold to Lilly Moore. The sale was confirmed, and under date of November 16, 1943, a sheriff's deed to the real estate was executed and delivered to Lilly Moore. The deed was filed in the office of the register of deeds on November 22, 1943, and recorded in Book 97, page 602. Thereafter Lilly Moore conveyed the real estate to Iva P. Dobbs.

"On February 23, 1954, the action out of which this appeal arises was commenced by Phillips filing a petition in which certain parties, including Iva P.

Dobbs and the board of county commissioners of Sheridan County, appellants here (hereinafter referred to as defendants) were made defendants. The petition alleged Phillips was a Delaware corporation with an operating office in Bartlesville, Oklahoma, and was authorized to do business in Kansas as a foreign corporation; that on May 31, 1935, the then owner of real estate executed and delivered to it a deed to an undivided one-half mineral interest in and under the Southeast Quarter (SE ¼) Sec. six (6) Township eight (8) South, Range thirty (30) West, Sheridan County, which was filed for record December 8, 1935; that since that date Sheridan County had duly assessed and levied taxes against its real estate, which it promptly paid, for each year including 1942 and that no taxes were delinquent on December 18, 1942, the date the foreclosure action was filed; that it was the owner of the legal and equitable title to and in the quiet and peaceable possession of an undivided one-half interest in and to all the oil, gas and other minerals in and under the real estate described; that defendants claimed some right, interest or title therein, with other allegations pertinent to a quiet title action; that the official records of Sheridan County reflected its correct address on December 18, 1942; that it had, at all times since its admission to do business in Kansas, maintained a duly registered agent upon whom process might be served; that personal service of summons could at all times have been obtained upon its registered agent or upon the Secretary of State as provided by law; that the affidavit of the county attorney to obtain service by publication knowingly and falsely stated that personal service of summons could not be had upon it; that no process or service of summons had been made upon it except by publication; that it had no actual notice of the tax foreclosure action until June 12, 1952, and that, by the exercise of reasonable diligence, it did not discover the fraud of defendants until sometime thereafter."

The Kansas court has adhered to this last decision to this date and now proposes to make it easier for an unscrupulous county official to practically steal valuable property in tax foreclosure suits by making it unnecessary for them even to name the owner of the property in the petition and making it unnecessary to notify him of the suit or secure service of summons upon him. It is interesting to note that the decision of the Supreme Court of the State of Kansas in this matter makes no attempt to protect the rights of any individual whose taxes have been paid. In the opinion the court says:

> "However, every owner knows, or if not by virtue of existing law is bound to know, that a tax will be levied against all real property; that if the tax is not paid it will become a lien against the property; that in due time the tax lien will be foreclosed; and that in due time the property will be sold and he will have but twelve months after the sale is confirmed to challenge the proceeding." To paraphrase what the court says, it could well be stated: Every owner knows that if he pays the taxes upon his property, that the same cannot be sold in a foreclosure proceeding by the county and his property taken away from him unless he is given an opportunity to present that defense in court in a suit wherein he is made a party and service of summons had upon him, and the statutes of this state specifically require that the petition shall contain the name of the owner of the property that is being foreclosed for taxes.

The legislature of the State of Kansas did not intend that persons should be deprived of their property in such a manner. The Kansas statutes attempt to safeguard the rights of the property owner, extending to him the privilege of paying the tax any time before the sale and even

after a tax foreclosure suit has been started. Section 79-2803, G.S. Kansas, 1949, provides:

> "If an order of sale has been issued the clerk shall thereupon issue and deliver to the sheriff a statement reciting such redemption specifically identifying the tract, lot or piece of real estate redeemed and thereupon the sheriff shall strike such lot, tract or piece of real estate from the execution or order of sale and shall not include it in the sale, and upon making return of the execution or order of sale he shall attach thereto such statement."

In this case, the petition contained two hundred twenty-five causes of action. (See Exhibit No. "C" in the appendix), and it is interesting to note that in the case of Womer v. Aldridge, 155 Kan. 446, our court says that there are 11,000 tracts or parcels of property in Sedgwick County, Kansas, involved in a tax foreclosure proceeding. This last-mentioned case involves the question as to who is to pay for the services of an abstracter in searching the public records and certifying to the court the names of all persons having or claiming to have an interest in each tract of real estate, as provided by Section 79-2801 and Section 79-2802, G.S. Kansas, 1949. If the rule set out in the case under consideration had been enunciated prior to the decision in the Womer v. Aldridge case, the court could have said that all it was necessary for the petition in a tax foreclosure suit to state was In Re Delinquent Taxes in Sedgwick County, Kansas, and in the body of the petition set out the 11,000 tracts or parcels of land on which the county claimed the taxes were delinquent. Then if this were followed

with a publication notice setting out the descriptions of the tracts of land, this would have been sufficient, and after one year, the title of the property owner would be extinguished. Of course, this constitutes a fine piece of legislation on the part of the Kansas court, because the legislature has said specifically that the name of the owner shall be set out in the petition, and that service of summons shall be had upon him the same as in other suits.

We think this decision places too great a burden on the owner of real property who has paid his taxes to search through the descriptions of the property set out in the published notice in a tax foreclosure suit to ascertain whether or not by mistake or design, his property is being sold for taxes, and if he fails to do so and a year elapses, then his property is gone, as the tax deed becomes absolute, whether he was made a party to the suit or not. The record in this case shows that the tax foreclosure was for unpaid taxes for the years 1944, 1945, 1948, 1950, 1951 and 1952. That the taxes for the years 1946, 1947, and 1949 had been paid, It is also interesting to note that the taxes upon the mineral interest in the whole eighty acres for the year 1944 was 82¢. The total amount of the tax on the mineral interests of the whole eighty acres included in the tax foreclosure suit was only $32.56 for those years, including interest and penalty (see Exhibit No. "C" in appendix). It is reasonable to presume that if appellants had been notified, even by postal card, of the tax foreclosure suit and that the county claimed that the taxes had not been paid on this property that might some day produce oil, or if they had been served with

summons, as the Kansas statutes provide, then an investigation could have been made to ascertain the situation relative to the taxes and show that the taxes had been paid, or pay the same if, in fact, they had not been paid.

The record in this case shows that William F. Jack was a resident of the State of Kansas (See Exhibit No. "E" in the appendix). Even if he had been named as a party defendant in the tax foreclosure suit, he would have been entitled to have been served personally with summons and not by publication (Section 60-2525, G.S. Kansas 1949). Is it possible for a court to avoid this statutory requirement of personal notice to a defendant simply by ignoring him and by not making him a party to the suit?

To sustain its decision, the Kansas court cites Winona & St. Peter Land Company v. Minnesota, 159 US 526 (1895) and Leigh v. Green, 193 US 79 (1904). In each of these cases, the state statutes did not require that the property owner be made a party to the tax foreclosure proceeding, and that service of summons be had upon the owner the same as other civil cases. The Kansas Statutes make this provision. The court also cites Ballard v. Hunter, 204 US 241 (1907). In that case the owners were non-residents and were made parties to the tax foreclosure suit and served with summons by publication. The principal question was whether the defendants were discriminated against and deprived of due process of law where the state statutes required personal service of summons on residents of the state. That is not the case under consideration. In view of the enlightened holding in the Mullane case, we doubt if this court would adhere to the

doctrine enunciated in the Winona and Leigh cases, as those cases were decided on the theory that the Fourteenth Amendment to the Constitution of the United States did not apply to in rem cases. This court now very properly holds that a party should not be deprived of his property in a so-called in rem suit where there is an opportunity to bring notice of the suit to him any more than in a suit designated as an action in personam, and this court also holds that there is nothing peculiar about litigation between the government and its citizens that should deprive those citizens of a right to be heard. So in the suit under consideration, we strenuously contend that appellants' property cannot be taken from them by a statute that limits the time for them to interplead in a suit to which they are not parties and of which they have not been notified or summonsed, as provided by statute.

It is elementary law that a party may not be legally deprived of his property simply by a statute of limitations. Even the Kansas court so holds in Murrison v. Fenstermacher, 166 Kan. 568, where the court held that Chapter 264 of the Session Laws of Kansas 1945 was unconstitutional. This was an act that provided in effect that plats of any original town or addition that had been of record for more than twenty-five years prior to the taking effect of this act shall be conslusively presumed to convey perfect title, notwithstanding any defect in the title of the grantor, provided always such presumption shall not be applied in any action brought within one year from the date this act takes effect. Many cases are cited in this opinion, but the rule of law is best set out in 34 Am.

Jur. 29 Para. 20, where the following statement appears: "Although the right to commence and prosecute an action may be lost by delay, it is a well-established principle that the right to defend against a suit for the possession of property is never outlawed. Hence, a statute cannot be sustained as one of limitations where it requires a party in full possession and enjoyment of property to bring an action within a given time or else forfeit it. A person in the possession of property cannot be required under penalty of forfeiture to bring an action against one claiming an adverse interest or title to such property."

If it be contended that the provisions of G.S. Kansas, 1949, Section 79-2804b is a statute of limitations that requires the appellants to bring an action within a year against the appellees because they claim an adverse interest or title to the property, then this section of the Kansas Statutes violates the Fourteenth Amendment to the Constitution of the United States. The appellants were as much in possession of the mineral interest owned by them as any other party, and the oil produced from the property was produced under a lease executed by appellants and appellees alike.

It is evident from the Kansas cases cited where taxes have actually been paid and suits have been brought to foreclose the same, either fraudulently or inadvertently, that this is an important question in this state, and that the rule relative to service by publication in this class of cases should not be extended so as to permit unscrupulous

officials to secure an owner's property under a fake foreclosure action. We believe that the question presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument.

Respectfully submitted,

JAY W. SCOVEL,
Citizens National Bank Building,
Independence, Kansas;

A. R. LAMB,
PAUL A. LAMB,
719 Walnut Street,
Coffeyville, Kansas;

Attorneys for Appellants.

APPENDIX A.

IN THE DISTRICT COURT OF CHAUTAUQUA COUNTY, KANSAS.

John Robertson, et al., Plaintiffs,

vs.

Lewis Woodard, et al., Defendants

No. 7204.

MEMORANDUM OPINION.

The parties to this action requested a pre-trial conference. Such a conference was held at which time stipulations were entered into by the parties and the case submitted to the Court upon certain legal questions whose answers it was agreed might or might not finally determine the case. Thereafter, briefs were submitted by counsel. The court has considered the briefs of counsel and has done some research of its own in regard to the questions presented.

It is the opinion of the court that the determination of one question fully disposes of the case and that the consideration of other questions presented is not necessary. The particular question involved is whether the interests of defendants Pauline Jack, William F. Jack and Margaret Lemmon were extinguished by the sale of the mineral rights involved under the tax foreclosure proceedings stipulated to as having taken place at the time and in the manner stated into the record. It is the opinion of the court that the interests of the said defendants were extinguished.

The court does not agree that the County Attorney, by reason of such decision, is in a position to omit the names of known owners of real estate involved in tax foreclosure proceedings. Within a one-year period any person so left out would definitely be in a position to come in and have such proceedings set aside as to him. It seems, however, that our Supreme Court has recognized with increasing firmness that the legislature intended to make

the title derived from such tax proceedings by the purchaser good and valid after the expiration of the one-year period. I believe that this position is reiterated in Phillips Petroleum Company vs. Moore, 179 K 482.

I do not believe that this decision is violative of the new process provisions of the constitution. As was stated in the Arizona case *Consolidated Motors vs. Skousen,* 109 P. 2d 41, 132 A.L.R. 1040, l.c. 1045 " . . . every owner of property knows that taxes must be paid thereon and the duty is imposed upon him of watching the various tax proceedings to protect his interests. If he is given a reasonable time and place to do this, the mere fact that he does not actually have notice thereof does not invalidate tax proceedings." I believe the weight of authority to be that the failure of the County Attorney to give the correct name of the owner in cases where he complies with the statute by giving the name of the supposed owner does not invalidate the proceedings as to the tract involved, after the one-year period proceeded by the statute has elapsed. Consequently, it will be the decision of the court that the interests of defendants, Pauline Jack, William F. Jack and Margaret Lemmon were extinguished by the tax procedure in the District Court of Chautauqua County.

Judgment will be entered in accordance with this opinion as of the 17th day of April, 1961, at Sedan, Kansas. Counsel will prepare an appropriate Journal Entry within ten days from the said date.

George S. Reynolds,

Judge of the District Court.

APPENDIX B.

Nos. 42,664 and 42,783 (Consolidated)

John J. Robertson; E. A. Smith; Sherman E. Smith; Max V. Schrier; Everett N. Mitchell; Charles V. Darnall; Walter E. Darnall; Lewis Woodard and May Woodard, his wife; Ben J. Funk and Lora B. Funk, his wife, *Appellees,* v. Margaret Lemmon; Pauline Jack; William F. Jack and Lena Claire Jack, his wife, *Appellants.*

SYLLABUS BY THE COURT.

1. TAXATION—*Mineral Interests—Tax Foreclosure Judgment—Statutory Limitation to Challenge Proceedings—Notice.* The provisions of G.S. 1949, 79-2804b, limit the time for challenging a tax foreclosure judgment to twelve months after the date the sale of the real estate was confirmed, even though the parties challenging the proceedings were not named in the petition or publication notice.

2. SAME—*Foreclosure—Statutory Limitation—Due Process Not Violated.* The provisions of G.S. 1949, 79-2804b, do not violate the due process clause of the Federal Constitution nor Section 2 of the Kansas Bill of Rights.

Appeals from Chautauqua district court; GEORGE S. REYNOLDS, judge. Opinion filed May 5, 1962. Affirmed.

A. R. Lamb, of Coffeyville, argued the cause, and *Paul A. Lamb,* of Coffeyville, was with him on the briefs for the appellants.

Gerald Cauldwell, of Sedan, argued the cause and was on the briefs for the appellees, Ben J. Funk and Lora B. Funk.

John M. Wall, of Sedan, argued the cause and was on the briefs for the appellees, Lewis Woodard and Mary Woodard.

The opinion of the court was delivered by

PARKER, C. J.: This is an action brought by the owners of an oil and gas lease to determine the owners of the mineral interests in certain real estate, and the ownership of the one-eighth royalty interest due and payable under the terms of such lease.

The petition alleged in substance that plaintiffs are the owners of an oil and gas lease on the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of Section Seven (7), Township Thirty-five (35) South, Range Twelve (12) East of the Sixth Principal Meridian, Chautauqua County, Kansas; that under the terms of the lease, plaintiffs are obligated to pay a royalty interest of an undivided one-eighth to the persons who are the owners of such royalty interest, but because of the conflicting claims between the owners plaintiffs do not know and are unable to ascertain the owners of such royalty interest. The petition asked that all the defendants be required to set up their purported claims, that the court determine their interests and bar all of the defendants from claiming any other right, title or interest therein.

The defendants, Ben J. and Lora B. Funk, answered alleging they had acquired the entire mineral interest by a sheriff's deed in a tax foreclosure action. The defendants, Lewis and May Woodard, answered alleging they are the owners of a one-half interest in the minerals which was conveyed to them by the Funk's. Any controversy heretofore existing between the Funks and the Woodards has been settled and they now appear in these appeals as appellees, having filed a joint counter-abstract and brief.

The defendants, Pauline Jack, William F. and Lena Claire Jack, husband and wife, and Margaret Lemmon, answered alleging that they owned an interest in the minerals, which was later stated by their counsel to be a total of three-tenths. They now appear as appellants in these appeals, claiming that, as they had no notice of the tax foreclosure proceedings, and were not made parties, their interests could not be foreclosed.

The original plaintiffs have maintained an impartial attitude throughout all of the proceedings, including these appeals.

The facts alleged in the various pleadings are not disputed. A brief review of such facts, as gleaned from the pleadings, may tend to simplify the issues.

W. F. Lemmon owned the mineral interest in the land in question. He died and, under the residuary clause in his will, the mineral interest passed to numerous persons including these appellants. His will was admitted to probate in Montgomery County, Kansas, on September 30, 1931, and the estate was finally settled on May 25, 1933. On May 6, 1933, the will was recorded in the probate court of Chautauqua County. The specific interests claimed by appellants were never made a matter of record nor listed for taxes as provided by G.S. 1949, 79-420 (now G.S. 1961 Supp., 79-420).

The appellants never paid any taxes, never exercised any control and, according to statements made in the briefs which are not denied, made no claim to such mineral interest until, or shortly before, the petition was filed in this action on June 8, 1960.

On May 25, 1936, three of the beneficiaries under the will of W. F. Lemmon conveyed a three-forths interest in the minerals to C. R. Ross. On May 26, 1936, another beneficiary conveyed a one-fourth interest in the minerals to C. R. Ross. Ross exercised full ownership over the mineral rights, all of which were listed for taxation in his name, and paid all taxes thereon until the year 1944, when such taxes became delinquent.

On October 7, 1953, an action was filed in the name of the Board of County Commissioners for Chautauqua County, Kansas, for the foreclosure and sale of the mineral interests in question. The petition alleged that C. R. Ross was the owner of the mineral interests and that Ross Oil and Gas Company and Chautauqua County claimed some interest in them that they were unpaid taxes, describing them, levied against such mineral interests for the years 1944, 1945, 1948, 1950, 1951 and 1952. Service was made by publication upon the above named defendants, naming them, and "all other persons who are or may be concerned." The publication described the mineral interest being foreclosed and gave the amount of delinquent taxes due upon it. On January 21, 1954, the district court of Chautauqua County entered its order finding that there was unpaid taxes upon the mineral interest; that the owners and claimants were as set out in the petition; foreclosed the lien for taxes, and ordered the property sold to satisfy the cost and lien. On February 8, 1954, an order of sale was issued to the Sheriff of Chautauqua County. Following publication of the notice of sale, describing the mineral interest, naming C. R. Ross as the owner and the amount of taxes and costs due, such Sheriff proceeded

to sell the mineral interest on March 16, 1954, to the appellee, Ben J. Funk. On May 13, 1954, the district court of Chautauqua County confirmed the sale and ordered the Sheriff to execute and deliver a deed to the purchaser at the tax sale. On May 15, 1954, a sheriff's deed was delivered to Ben J. Funk and Lora B. Funk.

The controversy was presented to the district court on pretrial conference, at which time it was agreed that the court should first determine the effect of the tax foreclosure action. On April 15, 1961, the court filed a memorandum opinion in which it stated:

> "It is the opinion of the court that the determination of one question fully disposes of the case and that the consideration of other questions presented is not necessary. The particular question involved is whether the interests of defendants Pauline Jack, William F. Jack and Margaret Lemmon were extinguished by the sale of the mineral rights involved under the tax foreclosure proceedings stipulated to as having taken place at the time and in the manner stated into the record. It is the opinion of the court that the interests of the said defendants were extinguished."

Judgment was entered in accordance with the memorandum opinion and a separate appeal perfected therefrom was here docketed as Case No. 42,664. A subsequent appeal from the trial court's order overruling a motion for a new trial was here docketed as Case No. 42,783. Later the appeals were consolidated.

Appellants, conceding that their contentions constitute a collateral attack on the tax foreclosure judgment, present the following questions for appellate review.

"Can an interest in real estate be extinguished in a tax foreclosure suit in which the known owners of such interest are not made parties to the tax foreclosure suit?

"Does a sheriff's deed issued in a tax foreclosure proceeding purporting to convey the interest of owners of real estate who are not parties to the foreclosure proceeding become final and absolute after the lapse of twelve months under Section 79-2804 (b), G.S. 1949, and if this section be so construed, does it violate the Constitution of the State of Kansas and the Constitution of the United States?"

We will first consider the statutes relating to the taxation of real estate and proceedings to collect such taxes. G.S. 1949, 79-101, reads:

"That all property in this state, real and personal, not expressly exempt therefrom, shall be subject to taxation in the manner prescribed by this act."

G.S. 1949, 79-1804 [now G.S. 1961 Supp. 79-1804], provides:

"All taxes shall be due on the first day of November of each year. A lien for all taxes shall attach to the real property subject to the same on the first day of November in the year in which such tax is levied, and such lien shall continue until such taxes and penalty, charges and interest which may have accrued thereon, shall be paid by the owner of the property or other person liable to pay the same: . . ."

G.S. 1949, 79-2301, *et seq.*, contains provisions for the sale of real estate for taxes.

Proceedings to enforce a lien for unredeemed real estate bid in by the county by judicial foreclosure and sale are provided by G.S. 1949, 79-2801, which states in part as follows:

"That in all cases in which real estate has been or shall be sold and bid in by the county at any delinquent tax sale and shall remain unredeemed on the first day of September of the third year after such sale, or any extension thereof as provided in section 79-2401a of the General Statutes Supplement of 1947 or any amendments thereto, the board of county commissioners shall order the county attorney and it shall be the duty of the county attorney to institute an action in the district court, in the name of the board of county commissioners, against the owners *or supposed owners* of such real estate and all persons having or claiming to have any interest therein or thereto, . . . " (Emphasis supplied.)

Appellants' contentions apply chiefly to the interpretation of G.S. 1949, 79-2804b, which, insofar as here material, provides:

"Legal or equitable actions or proceedings may be brought to open, vacate, modify or set aside any judgment rendered for taxes, interest and costs or any order of sale made under the provisions of section 79-2803 of the General Statutes Supplement of 1947 or amendments thereto, or any sale made under the provisions of section 79-2804 of the General Statutes Supplement of 1947 or any amendments thereof, but every such action or proceeding, including those brought to set aside judgments on the grounds and in the manner prescribed by the code of civil procedure, must be commenced within twelve months after the date the sale of the real estate, which was affected by such judgment, order of sale or sale, was confirmed by the court. The time limitation herein fixed for the bringing of any such action or proceeding shall be construed as a condition precedent to the bringing of any such action or proceeding and shall not be construed as a statute of limitations . . . "

The appellants contend that the provisions of the above statute do not apply to owners who were not made parties to the tax foreclosure action.

We cannot agree with appellants' contention. The language used in the statute is clear and requires no interpretation. The time limitation is a condition precedent to bringing the action. Every action brought to set aside a tax foreclosure judgment must be brought within twelve months after the date the sale was confirmed by the court. The contention of the appellants might have been proper if addressed to the district court in a timely proceeding to vacate or set aside the tax foreclosure judgment.

The court, as early as 1880, in *Pritchard v. Madren*, 24 Kan. 486, held:

> "Where the statute expressly authorizes service by publication of notice to all parties interested in lands upon which tax liens are sought to be foreclosed, such service must be held sufficient to sustain the jurisdiction, although the owner be a resident of the county, and not personally named in the notice, or otherwise served with process. *Gulf R. Co. v. Shepard*, 9 Kan. *647; *Fudge v. Fudge*, 23 Kan. *416.
>
> "Under said chapter 39, a failure to state the name of the true owner of the land in the petition and judgment will not vitiate the proceedings or render the judgment void." (Syl. ¶¶ 5, 6.)

Later in *Sheridan County Comm'rs v. Acre*, 160 Kan. 278, 160 P. 2d 250, we reached conclusions of law similar to those announced in the *Pritchard* case and, in doing so, said:

> "The legislature also provided (G.S. 1943 Supp. 79-2804b), that legal or actionable proceedings may be brought to open, vacate, modify or set aside any judgment in a tax foreclosure action, or any sheriff's sale

> in such an action. So, the legislature, recognizing the difficulty the county attorney might have to ascertain the owner, or supposed owner, or the names of all persons having or claiming an interest in the property, provided that any party to the action might file an answer which would present his claim to such ownership or interest, and then gave an additional time of six months for the bringing of an action to open, vacate, or modify the judgment. The appellee here took no advantage of any of the provisions of the statute above mentioned for its benefit in that regard . . . " (p. 287.)

The question remains, does this strict application of the statute violate the due process clause of the Federal Constitution of Section 2 of our Bill of Rights?

We must answer this question in the negative. A tax levied on an interest in real property is levied against the property. It is not a personal charge against the owner. However, every owner knows, or if not by virtue of existing law is bound to know, that a tax will be levied against all real property; that if the tax is not paid it will become a lien against the property; that in due time the tax lien will be foreclosed; and that in due time the property will be sold and he will have but twelve months after the sale is confirmed to challenge the proceeding.

The tax statutes, to which we have previously referred, give the owner of real property notice of the steps that will be taken in the levy and collection of taxes. If the owner sees fit to neglect the payment of the taxes he knows to be due, the duty is imposed upon him to watch the various tax proceedings and protect his interest. No other actual notice is required. (*Consolidated Motors, Inc. v. Skousen*, 56 Ariz. 481, 109 P. 2d 41, 132 A.L.R. 1040, 1045.)

An action to foreclose a tax lien is a proceeding *in rem* against the property. Here the property was properly described in the petition and in the publication notice.

The appellants rely chiefly on the case of *Walker v. Hutchinson City*, 352 U.S. 112, 1 L. Ed. 2d 178, 77 S Ct. 200. The case is not a precedent for the question now before us. There the court was dealing with a condemnation case. The owner had no reason to anticipate that his land was being condemned and proper notice was necessary.

The well-considered case of *Phillips Petroleum Co. v. Moore*, 179 Kan. 482, 297 P. 2d 183, appears to be decisive of the question now under consideration. Therefore we quote at length from the opinion, which reads:

> "The constitutionality of statutes prescribing the method of collection of taxes, under which personal notice of the pendency of such proceedings has not been given, has been challenged from time to time on the ground that they violate the due process clause of the federal Constitution. Such statutes have been uniformally sustained on the ground that the proceedings for the collection of taxes are *in rem*, and require no personal service of notice upon the owner or lienor of the land.
>
> "In *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526, 537, 538, 40 L. Ed. 247, 16 S. Ct. 83, Mr. Justice Brewer said:
>
> ". . . That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law.' (Citing cases.)

"In *Leigh v. Green,* 193 U.S. 79, 48 L. Ed. 623, 24 S. Ct. 390, the Supreme Court of the United States, in effect, held: Due process of law is not denied the holder of a lien on real property by the lack of any provision for personal service on him of notice of the pendency of proceedings *in rem* to enforce the lien acquired by a purchaser of the property at a tax sale, which are authorized by the Nebraska statutes, where notice is given by publication to all persons interested in the property to appear and set up their claims. (L. Ed. headnote No. 2.)

In *Ballard v. Hunter,* 204 U.S. 241, 51 L. Ed. 461, 27 S. Ct. 261, it was in effect, held: Due process of law does not require that the nonresident owners of lands within a levee district should have personal notice of the pendency of a suit to collect the levee taxes assessed upon their lands. (L. Ed. headnote No. 5.)

"We hold neither the due process clause of the federal Constitution, nor section 2 of our Bill of Rights was violated when service by publication was obtained upon Phillips, and the notice given in the tax foreclosure action under 79-2801 and G.S. 1949, 60-2525, *et seq.*, was such as to be reasonably calculated to apprise Phillips of the pendency of the action and afford it an opportunity to defend." (pp. 489, 490.)

Based on what has been heretofore stated and held we conclude that neither the due process clause of the Federal Constitution nor Section 2 of the Kansas Bill of Rights was violated by the provisions of G.S. 1949, 79-2804b, limiting the time for challenging a tax foreclosure judgment to twelve months after the date the sale of the real estate was confirmed, even though the parties challenging the proceedings were not named in the petition or publication notice.

It follows the trial court did not err in rendering the judgment appealed from in Case No. 42,664 or in its order overruling the motion for a new trial in Case No. 42,783. Therefore the judgment and the order overruling the motion for a new trial must be affirmed.

It is so ordered.

APPENDIX C.

Filed September 28, 1953.

IN THE DISTRICT COURT OF CHAUTAUQUA COUNTY, KANSAS.

The Board of County Commissioners of Chautauqua County, Kansas, composed of C. B. Cable, Hiram Williams and Leslie Wilson, *Plaintiffs,*

vs.

R. W. Akin, W. B. Allen, W. E. Allen, J. H. Anderson, C. D. Appleby, Ethel Madge Ausmus, Dorothy L. S. Bain, G. C. Bain, A. F. Baker, Everett J. Baldwin, Lola B. Baldwin, O. P. Baldwin, deceased, Ora Bales, Sarah E. Ball, Edith Barker, Verda Barnett, H. E. Bartholow, Vesta I. Bell, William Bell, Tressa Bever, W. B. Birch, M. B. Blair, Glen Blauvelt, Melvin L. Blenden, Ethel May C. Bond, Elsie Boone, Roy L. Bopst, Matilda Boulanger, Mitcher Boulanger, Deceased, Willie Boulanger, Arley Bradley, Elzie Bradley, J. E. Bradley, Omar Bradley, R. H. Bradley, Walter Bradley, J. E. Brooks, Deceased, Lou D. Brooks, Deceased, Frank Bryan, T. J. F. Buck, Andrew C. Burger, Lee Burns, Louis Francis Burns, C. J. Burson, Elsie Pearl Buzick, W. R. Buzick, Iva Bybee, John Camp Estate, H. J. Campbell, Electa Caldwell, C. A. Callahan, C. W. Carmen, J. N. Carr, Estate, Chautauqua Springs, Kansas, Chautauqua State Bank, Chautauqua, Kansas, Dave Chilcote, Effie Clark, Eliza Clark, Russell Cobb, E. C. Conner, Celoyse G. Couch, Martin V. Cox, Ida N. Cragg, John W. Cragg, Everett Crawford, H. G. Crum, S. A. Crum, Frances H. Cullinan, Hazel R. Cullinan, S. J. Cullinan, Frances Cummings, Walter Cummings, Wayne Cummings, D. A. Dabney, J. E. Danison, Neta Danison, Bernice Davis, R. S. De Long and Son, Al Deschner, Leslie L. Dickey, G. F. Dikeman, deceased, O. L. Dikeman, C. A. Dingman, J. M. Dosbaugh, M. J. Dosbaugh, Lillie A. Drennan, W. A. Druley, Carrie Duffey, Otis Duffey, J. B. Dunn, H. O. Durham,

Arthur Duvall, D. B. Easley Estate, George Ecker, Deceased, S. L. Ecker, S. Lowell Ecker, Joanna Eisinminger, Joushua Eisinminger, L. S. Elenburg, Minnie Elenburg, S. B. Elenburg, Elgin State Bank, Alta Elliott, Harbon Elliott, Federal Land Bank, Joe File, Brown Fine, L. B. Fisher, Horace J. Fitzpatrick, C. W. Floyd, John Floyd, Stephen Frazier, Herschel Freeman, Mary Allene Freeman, Minnie Ellen Freeman, Margaret S. Gay, Wm. Geiser, W. S. Geren, Jesse Gorby, Chas. G. Gregg, Essie Gregory, Deceased, P. A. Gregory, Margaret Haddican, Deceased, J. B. Hall, E. Halliday, Fred Hamilton, Deceased, Helen Harmon, Roy L. Harmon, Frank Harris, George W. Harris, S. W. Harris, Deceased, Alice A. Hazelton, Nelson E. Hazelton, Floyd Herman, Della Hessert, E. C. Hessert, Ed Hessert, Valentine Hessert, Neta L. High, O. H. High, Opal Hill, Frances Hines, George W. Hines, James S. Hobgood, James Hobgood, Bertha Hoskins, C. E. Hoskins, F. B. Hudson, Byron G. Hunter, Walter E. Hunter, Joseph E. Hutchens, Joseph Hutchens, Anna Hutchinson, Rueben Hutchinson, Robert Hutton, Eva R. Inge, Luther C. Inge, William Inge, Interstate Oil and Gas Company, John R. Ives, Jarecki Manufacturing Company, Edna Jenkins, John Lindas Oil Inc., Andrew Johnson, Grace M. Johnson, Iva Johnson, Lillie Johnson, Lois F. Johnson, Mike B. Johnson, Preston W. Johnson, Mabel Dent Jones, Flora Julian, Joseph Julian, Mabel Ann Kelley, Rush Kelley, Jr., Sophie Kenison, Rose Kennedy, Nelson Keys, J. C. Kiles, Demma Kincaid, George Kincaid, Gertrude Kincaid, Geo. A. King, U. Sidney Kirkpatrick, W. Kirkpatrick, C. P. Klein, M. O. Koesling, W. H. Kyles, L. B. Lawson, Roy H. Leniton, Walter Leniton, George Lewis, Joseph F. Lipscomb, C. A. Loudon, Fannie G. Luggle, C. C. Lyle, Elmer Lyon, Ethel McAtee, Harry E. McCallion, H. McCaslin, O. L. McElroy, Belle Briggs McGregor, Grant McGregor, Grace A. McMillan Estate, Nona McVey, Walter L. McVey, O. P. Marshall, Deceased, Ola Marshall, Ollie Marshall, Jarah J. Mathews, Sarah Mathews, Geo. M. Meacham, W. Herbert Meacham, V. R. Meadows, K. S. Meek, Ticy Meek, Eleanor J. Mellen, John Messacher, J. Milton, David Mitchell, Ella Gorby Mitchell, Flossie Mae Mobley, W. L. Mockbee, J. K.

Moffett, Monarch Royalty Corporation, Stanley Moore, Barbara J. Moran, John E. Moran, Robert M. Moran, Lura Moreland, C. O. Murphee, Juaneta Murray, Juanita Murray, Alice Mustoe, Maurice Kent Mustoe, Henry Myers, Lowell Pope Nelson, Niotaze Grange No. 1680, Niotaze I.O.O.F. Lodge No. 438, Niotaze State Bank, Vesta June Nobles, R. K. Noland, A. J. Norris, Fred Osborn, Katherine Parker, John R. Parman, Mrs. John R. Parman, James E. Patterson, Florence Patteson, Edith M. Peister, Chester Pendergraft, J. Henry Pendleton, Penticostal Holiness Church, Cynthia Petty, Phoenix Mutual Life Insurance Company, Edith M. Piester, H. E. Pinard, Lottie Pinard, O. F. Pitts, Fielding Henry Pope, Glenn A. Pope, John H. Pope, Deceased, Joseph Edward Pope, Sylvia Pope, Waller E. Pope, Alice M. Powell, Prairie Oil and Gas Company, Joe Prichard, Lorena Prichard, Geo. Rahn, Neil Rahn, John W. Reece, Susan M. Reed, Flora Mae Ray, J. M. Ray, H. N. Reid, Deceased, Alice Pope Reins, M. W. Reynolds, E. R. Rhodes, Howard Riley, Glenn G. Rinch, Roberta C. Rinch, F. H. Rippetoe, Maude Roberts, R. M. Roberts, I. G. Robertson, D. Rodgers, James Rodgers, Ross Oil and Gas Company, C. R. Ross, Bessie Rowland, Betty Royse, Ralph Royse, Guy Ray Rutland, Laura Rutledge, Sachem Oil Company, Sagamore Oil and Gas Company, D. F. Sarver, Kate Sarver, School District No. 8, Alf Scott, Ira Scott, Mary Scott, Mary J. Sears, W. H. Sears, Sedan Gas Company, Sedan Gas and Water Company, Sedan Rebekah Lodge No. 33, Sedan State Bank, S. B. Seivert, L. D. Severns, Deceased, Nell Severns, Ernest Sewell, Jr., Mayme F. Sewell, Robert I. Sewell, C. B. Shaffer, Chester D. Shane, S. F. Shinn, N. A. Shipley, E. E. Shircliff, Myrtle G. Shircliff, M. W. Shriver, Sinclair Oil Company, Sinclair Prairie Oil Company, Sinclair Prairie Pipe Line, F. E. Sipple, F. E. Sipple Estate, Fleta Sleeth, Ivan Sleeth, Chas. Smith, Delphine Smith, Eliza Anna Smith, Sarah Smith, Deceased, W. H. Smith, Hattie L. Smurr, John Sooby, Margaret Spire, E. S. Stafford, Ambrose M. Starr, Bonnie Hazel Stephenson, Bert H. Stewart, Ellen Stewart, Wanda Grace Stewart, J. R. Stone, Emma Stotts, Deceased, Hester J. Stoy, Frank Strickler, C. Riley Strong, Minnie Strong,

William P. Sullivan, L. T. Sutter, O. E. Sutter, Lane Sweeney, Abe Swisher, Nina Swisher, Nina Mae Swisher, Allan C. Tanksley, Deceased, Annie V. Tanksley, E. C. Tanksley, Margaret J. Tanksley, Mary Tanksley, Eleanor Bradley Taylor, Reuben Thornton Taylor, Lester E. Terrell, C. W. Thierold, Cora A. Thompson, Clarinda G. Tindal, Ray Tindal, A. M. Turray, Frank Uhls, Sine Uhls, Union Gas System, United Royalty Corporation, Lura Van Demark, C. M. Van Tassell, Kirke C. Veeder, Gladys V. Vollersen, Easel Vulgamore, Hugh Vulgamore, Edith Walker, Leo Wall, Louise Floyd Wall, Creekmore Wallace, Marquess Wallace, Mary B. Wallace, H. A. Walling, Ida D. Walton, Wylton Watson, Joe Warmbrodt, Ernestine Sewell Wayland, Edward Weaver, Hallie V. Webber, N. S. Wellman, J. F. Wells, Floyd C. Wemmer, Irvin S. Wemmer, L. H. Wendt, Lyman West, C. R. Whartenby Estate, George O. Whisler, Mary Irene Whisler, Stewart James Whitcomb, Albert White, Chas. H. White, Lillian White, Tell T. White, E. W. Whitney, Laurence Wild, C. K. Williams, Elnora E. Williams, F. E. Williams, Hattie L. Williams, Sylvester C. Williams, Undine Pope Williamson, B. D. Wilson, Dosha Wilson, J. H. Wilson, Emma Wyatt, R. E. Young, A. A. York, *Defendants*.

PETITION.

Comes now the plaintiff above named and for its cause of action against each and all of the above named defendants allege;

THAT Chautauqua County is a duly constituted County of the State of Kansas, organized and existing with C. B. Cable, Hiram Williams and Leslie Wilson as its Board of County Commissioners. That the post office address of said Board is Sedan, Chautauqua County, Kansas.

THAT at all times wherein material, Chautauqua County by resolution has adopted provisions of an act of the legislature of 1921, entitled

> "An Act regulating the sale of real estate for delinquent taxes in such counties as shall accept and adopt the provision of this act".

and in accordance therewith and the provision of article 28, Chapter 79, G.S. 1949, Supplement, has bid in the respective lots, tracts and parcels of land described in the respective causes of action hereinafter set out.

THAT said lots, tracts and said parcels of land so bid in by Chautauqua County have been held for three years or any extension thereof, as provided by the laws of the State of Kansas, by reason whereof they are subject to foreclosure and sale as provided by law.

That the Board of County Commissioners ordered the County Attorney to institute an action in the District Court of Chautauqua County, Kansas, in the name of the Board of County Commissioners of said County against the owners, supposed owners and all persons having or claiming to have any interest in said respective lots, tracts or parcels of land to foreclose the lien of the County for such taxes and to bar and foreclose all such persons from claiming any right, title or interest thereto.

THAT the various causes of action hereinafter set out numbered 1 to 225th, state the date of sale of said respective lots, tracts and parcels of land, when the same were bid in by the County, as provided by law together with the amount of taxes, charges, interest and penalties against said lots, tracts and parcels of land. That said causes of action also state the names, of the owners, supposed owners and all persons having or claiming to have any right, title or interest therein or thereto. Said respective lots, tracts, or parcels of land, with said allegations are as follows, to-wit:

PLAINTIFF for its 84th cause of action alleges and states; that on the 4th day of September, 1945, the following described real estate situated in the County of Chautauqua, in the State of Kansas, to-wit:

> All the oil, gas and other mineral interest in and to The South Half of the Southeast quarter of Section 7, Twp. 35 S. Range 12 E.

was sold as provided by law, for delinquent taxes due thereon for the year A.D. 1944, and bid in by the County

of Chautauqua at such delinquent tax sale, and the same has remained unredeemed, and the certificate of sale untransferred since the purchase thereof by the County. That the amount of taxes, penalties and interest thereon chargeable to said described property, as far as practicable to be ascertained, is as follows, viz:

	Principal	Interest And Other Charges	Total Charges
Taxes for the year 1944	$ .82	$ .98	$ 1.80
Taxes for the year 1945	$ 1.16	$ 1.10	$ 2.26
Taxes for the year 1946	$	$	$
Taxes for the year 1947	$	$	$
Taxes for the year 1948	$ 4.55	$ 2.92	$ 7.47
Taxes for the year 1949	$	$	$
Taxes for the year 1950	$ 5.15	$ 1.84	$ 6.99
Taxes for the year 1951	$ 5.83	$ 1.30	$ 7.13
Taxes for the year 1952	$ 6.16	$ .75	$ 6.91

Making the aggregate due on the 25 day of September, 1953, the sum of $ 32.56.

That the name of the owner of said property is C. R. Ross and that Ross Oil & Gas Company, Chautauqua County claims some interest therein and thereto, the exact nature and extent of which is unknown to said plaintiff.

WHEREFORE, the premises considered, the plaintiff prays that the Court determine the amount of the taxes, charges, interest and penalties chargeable against each lot, tract or parcel of land above set out, together with the name of the owner and all persons having any interest therein. That the Court adjudge and decree the amount to be due to be a first and prior lien against said respective lots, tracts and parcels of land and that the Court order the same to be sold at public sale to satisfy said lien, together with costs and expenses of said suit and that each

and all of the defendants hereto be forever barred and foreclosed from setting up or asserting any right, title, interest or claiming any interest in or to said land or any part thereof and that plaintiff have such other and further relief as may be just and necessary.

Gerald Cauldwell,
County Attorney.

I, Cleopha Call, Clerk of the District Court in and for the County of Chautauqua, State of Kansas, do hereby certify that the foregoing instruments, consisting of five pages, is a true and correct copy of the caption and petition in the case of Board of County Commissioners of Chautauqua County, Kansas, composed of C. B. Cable, Hiram Williams and Leslie Wilson, v. R. W. Akin, et al., Case #6750, insofar as the same pertains to all the oil, gas and other mineral interest in and to The South Half of the Southeast quarter of Section 7, Twp. 35 S. Range 12 E., Chautauqua County, Kansas, and cause of action #84, as the same appear of record in my office. I further certify that said tax foreclosure petition contains 225 causes of action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of October, 1962.

Cleopha Call,
Clerk of the District Court of
Chautauqua County, Kansas.

(SEAL)

APPENDIX D.

No. 34,129

PAULINE JACK, WILLIAM F. JACK, and W. G. JACK, *Appellees, v.* WINNIE SEVERNS, *Appellant, et al.*

(86 P. 2d 514)

SYLLABUS BY THE COURT

1. WILLS—*Construction—Intent—Giving Effect to Every Word and Clause.* In the interpretation of a will, the primary duty of the court is, first, to ascertain the intention of the testator from the provisions of the will itself, and second, to give every single provision of the will a practicable operative effect.
2. SAME—*Construction—Presumption Specific Disposition Intended.* The classification of property interests into categories of real property and personal property when title to such interests passes from grantor to grantee by ordinary instruments of conveyance is not to be applied to the provisions of a will if the result would be a virtual nullification of the intentions of the testator.
3. SAME—*Construction.* The specific provisions of a will examined and held to be governed by the familiar rules of law stated in this syllabus, paragraphs 1 and 2.

Appeal from Chautauqua District Court; ALLISON T. AYRES, judge. Opinion filed January 28, 1939. Affirmed.

J. W. Dalton, of Sedan, for the appellant; *Clay Tallman* and *E. O. Patterson,* both of Tulsa, Okla., for Stanolind Crude Oil Purchasing Company.

A. R. Lamb, Clement A. Reed, both of Coffeyville, and *R. O. Robbins,* of Sedan, for the appellees.

The opinion of the court was delivered by

Dawson, C. J.: This was an action to determine the rights of these litigants under the will of the late W. F. Lemmon, of Montgomery county, and for an accounting of the proceeds of certain royalty interests incidental to the main issue between the parties.

In the course of his lifetime W. F. Lemmon became the owner of 440 acres of Chautauqua county land. Some of this land was subject to oil and gas leases at the times of its acquisition, and in some instances he acquired certain leasehold interests in some of these lands before he acquired the land itself. These details, however, will require no present attention.

On August 30, 1926, Lemmon executed a deed of general warranty conveying to L. D. Severns four described eighty-acre tracts of land in sections 9 and 10, township 35 south, range 12 east, in Chautauqua county, in fee simple, with a reservation therein (designated A for convenience) which read:

> "This deed is made subject to all the gas and oil leases on said land and all the conditions therein. Also, said W. F. Lemmon reserves and retains to himself and his heirs and assigns a one undivided sixteenth (1/16) royalty interest in all gas or oil produced from any of said land at any time, and said L. D. Severns shall have all the other royalties provided for in said leases, except said Lemmon may have all the 1/8 royalty on the two producing oil wells now on said land."

Three years later, on September 23, 1929, Lemmon sold and conveyed to L. D. Severns two described forty-acre tracts in the same sections 9 and 10 mentioned above.

This conveyance was made by warranty deed, in fee simple with a reservation therein (designated B for convenience) which read:

> "Excepting and reserving to said W. F. Lemmon and his former assigns all gas and oil rights and all other mineral rights in and to said land, and all gas and oil improvements thereon, with full power to operate for said gas, oil and minerals without any molestation or interference by the grantee herein or his heirs or assigns. It being distinctly understood that said grantee in this deed gets no gas or oil rights or other mineral rights by this deed."

At the time of Lemmon's death, in September, 1931, the members of his family chiefly concerned in this lawsuit were these: Mrs. B. L. Brockman, a daughter; Rees H. Lemmon, a son; George J. Lemmon, a son, and Margaret Lemmon, wife of George; W. G. Jack, widowed husband of Ermie, a deceased daughter; and George Amour Jack, Pauline Jack and Wm. F. Jack, grandchildren of Lemmon by his deceased daughter Ermie and her husband, W. G. Jack. In his will, which was duly probated, Lemmon, the testator, made certain bequests of no present concern. One devise was that of the family homestead with its household goods which the testator gave to his three grandchildren at a valuation of $800 to be charged against their collective shares of his estate.

Another devise or bequest was as follows:

> "(4) I hereby give, devise and bequeath to Mrs. B. L. Brockman, my daughter, all of my oil and gas rights in the SW ¼ of the SW ¼ of section 3 and the NW ¼ of the NW ¼ of section ten, township thirty-five, range eleven, in Chautauqua County, Kansas, including any and all other rights which I may

own or hold at the date of my death in and to said land."

Next followed the provision of the will which provoked this lawsuit. They read:

"(6) I hereby give, devise and bequeath to Mrs. B. L. Brockman, my daughter; (W. G.) Jack, my son-in-law; Rees H. Lemmon, my son, and George J. Lemmon, my son, share and share alike, all of the real estate I may own in fee at my death which is situated in Chautauqua county, Kansas.

"(7) All the balance of my property not heretofore disposed of, which I may own at the time of my death, real, personal and mixed, whereever situated, and of every kind and character, I hereby give, grant, devise and bequeath as follows, to-wit:

"To Mrs. B. L. Brockman, my daughter, one-fifth of all such property.

"To my son, Rees H. Lemmon, one-fifth of all of such property.

"To my son George J. Lemmon, one-tenth of all such property.

"To Margaret Lemmon, wife of George J. Lemmon, a one-tenth of all such property.

"To George Amour Jack, Pauline Jack and William F. Jack, the three children of my deceased daughter, Ermie L. Jack, one-fifteenth each of all such property.

"To (W. G.) Jack, husband of my deceased daughter Ermie L. Jack, a one-fifth of all such property."

In 1933 George Amour Jack, grandson of the testator, died, leaving as his sole heir his father, W. G. Jack.

In 1935 Mrs. Brockman and her two brothers, Rees and George Lemmon, executed to the defendant, Winnie Severns, their mineral deed which purported to convey

all the property rights and interests reserved in the deeds of 1926 and 1929 from Lemmon to L. D. Severns (designated A and B for convenience), as set out above.

Since these happenings, oil and gas wells have been developed on the lands conveyed by the deeds of 1926 and 1929. The Stanolind Crude Oil Purchasing Company has received and marketed the oil produced on these lands.

On the assumption that all the oil and gas rights included in the reservations A and B in the deeds of 1926 and 1929 had been devised under paragraph (6) of Lemmon's will and had passed to Winnie Severns by the mineral deed she received from Mrs. Brockman and her two brothers, defendant Severns has exercised exclusive rights of ownership in the royalty and other mineral interests in those lands.

Hence this lawsuit by the surviving grandchildren of the testator and their father, W. G. Jack, to obtain an interpretation of the will, and for an adjudication of their interest and for an accounting. Winnie Severns was named as principal defendant, and the Stanolind Crude Oil Purchasing Company was impleaded. W. G. Jack casts his lot with his children in this lawsuit as beneficiary under paragraph 7 of the will and as sole heir of his deceased son, George Amour Jack.

Plaintiff's petition pleaded all the pertinent facts and alleged—

> "That it was the intention of the said W. F. Lemmon that the property so reserved by said exhibits 'A' and 'B' should pass under said paragraph numbered 7 of said last will and testament."

Defendant demurred to this petition on the ground that it did not state a cause of action.

This demurrer was overruled and defendant appeals, contending that the reservations designated A and B which W. F. Lemmon specifically retained to himself when he executed the conveyances of 1926 and 1929 to L. D. Severns were reservations of interest in land, real property, not personal property; and as such those reserved interests passed to the beneficiaries under paragraph (6) of the will; and that they are now vested in this defendant, Winnie Severns by virtue of the mineral deed she holds from Mrs. Brockman and her brothers, Rees H. Lemmon and George J. Lemmon.

Counsel for appellant cites and quotes from many standard authorities, including some of our own decisions, to the effect that reservations of mineral rights in deeds of conveyance, in substantially the same terms as those incorporated in the deeds of 1926 and 1929 set out above and designated A and B, respectively, are ordinarily recognized as interests in real estate, not as personal property. We have recently had occasion to familiarize ourselves with this feature of the law of property in Richards v. Shearer, 145 Kan. 88, 64 P. 2d 56; Shaffer v. Kansas Farmers Union Royalty Co., 146 Kan. 84, 69 P. 2d 4; and Serena v. Rubin, 146 Kan. 603, 72 P. 2d 995.

Counsel for the appellees, however, do not controvert this general doctrine. In their brief they say: "While it is true that mineral rights in land is a part of the real estate, still it would be very unusual for an oil man to so describe it."

What appellees mainly depend on to maintain their cause of action against defendant's demurrer were the allegations of their petition respecting the testator's intentions as expressed in the will itself.

On behalf of appellant it is urged that parol evidence of the testator's intention is not admissible where there is no ambiguity of language in the will. That general rule is correct. (Postlethwaite v. Edson, 102 Kan. 104, 171 Pac. 769; Guthrie v. Guthrie, 130 Kan. 433, 435, 286 Pac. 195). But mayhap this appeal can be disposed of without invoking that rule, certainly without violating it.

The primary rule for the proper interpretation of a will is to ascertain the testator's intention as expressed in the will itself. (Ernst v. Foster, 58 Kan. 438, 443, 49 Pac. 527; Brown v. Brown, 101 Kan. 335, 166 Pac. 499; Hinshaw v. Wright, 124 Kan. 792, 262 Pac. 601, syl. paragraph 1 and citations.)

In Kent v. Armstrong, 6 N. J. Eq. 637, 638, the rule was thus stated:

> "In the construction of wills, the primary and important inquiry is to ascertain the intention of the testator; indeed pretty much all the rules for construing wills and devises are based upon what is the apparent or the presumed intention of the testator; and if that appears to be clear and not in violation of any established principle of law, that intention is to govern without further inquiry or regard to mere technical terms (2 P. Wm. 741; Doug. 431; 4 Vesey 51). And in tender regard for the supposed situation of a testator, the law regards his acts with extreme indulgence and without the presumptions which are raised against the grantor or the grantee of an estate."

The testator's intention is to be ascertained by a careful consideration of all the provisions of the will—everything "within the four corners thereof," as the lawbooks say. So let us first examine paragraph (4) of the will. In it the testator gave to his daughter all his oil and gas rights in a certain forty-acre tract which he owned in fee simple, and in the same paragraph he also gave her his oil and gas rights in another forty-acre tract which (subject to reservation B) he had conveyed away in his deed of 1929. He also devised to the daughter in the same paragraph (4) "any and all other rights" he might own or hold at his death "in said land."

It will hardly be gainsaid that in paragraph (4) the testator did not devise the fee to the first forty-acre tract mentioned in that paragraph, nor that the fee (subject to reservation B) to the second forty acres mentioned in that paragraph had been conveyed away by the testator's deed of 1929.

Coming now to paragraph (6) of the will, it seems clear that subject to the oil and gas rights bequeathed to Mrs. Brockman in paragraph (4), the first forty acres there mentioned was devised in fee simple to the four beneficiaries named in paragraph (6). Of course, the same paragraph would also pass title to any other lands which the testator may have acquired after the will was executed.

So far as determinable by a careful examination of the entire will, it is proper to infer that the testator intended to make specific dispostion of his entire estate; and such is the general rule of interpretation. (Mann v. Haines, 146 Kan. 988, 998, 73 P. 2d 1006.) But if we should sustain

the contention of appellant that all the mineral rights, royalties and kindred interests possessed by the testator passed to the named beneficiaries in paragraph (6) of the will, then paragraph (7) which was formulated with painstaking detail to give the testators' residual estate to the eight beneficiaries named therein was merely a mouthful of words, signifying nothing. Such an interpretation of the will would do violence to another rule of construction. That rule is that every provision of a will should be given operative construction if possible. In Ernst v. Foster, 58 Kan. 438, 49 Pac. 527, it was said:

> "It is a general rule that a will should be construed so as to give effect to every part thereof, providing an effect can be given to it which appears to be consistent with the general purpose of the testator as gathered from the entire instrument." (Syl. paragraph 3.)

This rule has often been invoked in our later decisions. (Bullock v. Wiltberger, 92 Kan. 900, 904, 142 Pac. 950; Regnier v. Regnier, 122 Kan. 59, 251 Pac. 392; Votapka, v. Votapka, 136 Kan. 224, 226, 14 P. 2d 732.)

No error in the judgment of the district court is made to appear. That judgment is therefore affirmed.

(Reported in 149 Kansas, 229).

APPENDIX E.

Filed November 2nd, 1937.

IN THE DISTRICT COURT OF CHAUTAUQUA COUNTY, KANSAS.

Pauline Jack, Wm. F. Jack and W. G. Jack, *Plaintiffs*, vs. Winnie Severns, and D. B. Severns, her husband, John J. McLaughlin, E. P. McLaughlin, Wm. G. Lemmon, single, Beatrice L. Rose and J. G. Rose, her husband, Rees H. Lemmon and Lorene Lemmon, his wife, George J. Lemmon and Violet Lemmon, his wife, Stanolind Crude Oil Purchasing Company, a corporation, Philcade Bldg., Tulsa, Okahoma, and the Stanolind Pipe Line Company, a Corporation, *Defendants*.

PETITION

Comes now the plaintiffs in the above entitled action and for their cause of action against the defendants, allege and aver:

That the Plaintiff Pauline Jack is now a resident and has her post office address located at St. Joseph Hospital, Booneville, Missouri, the Plaintiff Wm. F. Jack is a resident and has his post office address located at 1529 Kentucky, Lawrence, Kansas, and the Plaintiff W. G. Jack is a resident and has his post office address located at Caney, Kansas.

I, Cleopha Call, Clerk of the District Court in and for the County of Chautauqua County, State of Kansas, do hereby certify that the above and foregoing is a true and correct copy of the caption and the first paragraph of the petition in the above-entitled case, No. 5759, as the same appears of record in this Court.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of October, 1962.

Cleopha Call,
Clerk of the District Court of
Chautauqua County, Kansas.

(SEAL)

APPENDIX F.

IN THE PROBATE COURT OF CHAUTAUQUA COUNTY, KANSAS.

In the Matter of the Estate of W. F. Lemmon, Dec'd.
Olive L. Witt - - Executrix.

APPLICATION TO ADMIT WILL TO RECORD

Comes now Olive L. Witt, executrix of the estate of W. F. Lemmon, deceased, by J. W. Dalton, her attorney, and makes this application to the court for an order admitting to record in this county a duly authenticated copy of the Last Will and Testament of the said W. F. Lemmon, deceased, and a copy of the order admitting said will to probate, and for the grounds of this application states:

That the said Last Will and Testament of the said W. F. Lemmon was duly admitted to probate in the Probate Court of Montgomery County, Kansas, on September 30, 1931, as and for the Last Will and Testament of the said W. F. Lemmon, deceased.

That under the terms and provisions of said Last Will and Testament, real estate situated within Chautauqua County, Kansas was devised thereby. That copies of said Last Will and Testament, together with the order admitting the same to probate in Montgomery County, Kansas, duly authenticated by the Judge and Clerk of said court, as provided by law, are submitted herewith.

WHEREFORE, the premises considered, your applicant prays that the duly authenticated copy of the Last Will and Testament of the said W. F. Lemmon deceased, together with the order admitting said Will to probate be admitted to record in this county, in accordance with the provisions of R. S. 22-221.

J. W. Dalton,
Attorney for Applicant.

Filed this 6th day of May, 1933.

IN THE PROBATE COURT OF CHAUTAUQUA COUNTY, KANSAS.

In the Matter of the Estate of W. F. Lemmon, Dec'd.
Olive L. Witt - - Executrix.

ORDER ADMITTING WILL TO RECORD

Now on this 6th day of May, 1933, the same being a regular day of the May, 1933 term of said court, the above matter comes on for hearing on the application of Olive L. Witt, Executrix of the Estate of W. F. Lemmon, deceased, to admit to record in this court a duly authenticated copy of the Last Will and Testament of W. F. Lemmon, deceased, together with a copy of the order admitting said Will to probate in the Probate Court of Montgomery County, Kansas, the applicant appearing by J. W. Dalton, her attorney.

Thereupon, after being duly and fully advised in the premises, and examining the authenticated copy of the Will and order hereinbefore referred to, the court finds that said authentication is in due form of law and by the proper officers and that it appears from the evidence introduced and from the records submitted that said Last Will and Testament has been admitted to probate in the Probate Court of Chautauqua County, Kansas, as and for the Last Will and Testament of the said W. F. Lemmon, deceased.

The court further finds that under the terms and provisions of said Will, real estate situated in Chautauqua County, Kansas is devised thereby and that said authenticated copies should be admitted to record in this county, as provided by law, as and for the Last Will and Testament of the said W. F. Lemmon, deceased, together with the record of the probate thereof.

WHEREFORE, it is by the court ordered, adjudged and decreed that said application be granted and that the authenticated copies of the Last Will and Testament of the said W. F. Lemmon, deceased, and the order of probate

thereof be and is hereby admitted to recover in this county as and for the Last Will and Testament of the said W. F. Lemmon, deceased.

WITNESS my hand this 6th day of May, 1933.

W. H. Helmick
Probate Judge.

Filed this 6th day of May, 1933.

(SEAL)

The undersigned, Probate Judge of the Probate Court of Chautauqua County, Kansas, and ex-officio clerk of said Court, does hereby certify that the above and foregoing application to admit will to record and order admitting will to record in the matter of the estate of W. F. Lemmon, deceased, are true and correct copies of said instruments as the same appear of record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 1st day of October, 1962.

Elizabeth A. Dunn,
Probate Judge of the Probate Court of Chautauqua County, Kansas, and Ex-Officio Clerk of said Court.

(SEAL)

APPENDIX G.

Section 79-2801. Action to enforce lien for unredeemed real estate bid in by county; summons; service by publication. That in all cases in which real estate has been or shall be sold and bid in by the county at any delinquent tax sale and shall remain unredeemed on the first day of September of the third year after such sale, or any extension thereof as provided in section 79-2401a of the general Statutes Supplement of 1947 or any amendments thereto, the board of county commissioners shall order the county attorney and it shall be the duty of the county attorney to institute an action in the District Court, in the name of the board of county commissioners, against the owners or supposed owners of such real estate and all persons having or claiming to have any interest therein or thereto, by filing a petition with the clerk of such court: Provided, That in all cases where the real estate involved is a mineral interest in land which has been severed from the fee, the bringing of such action for the foreclosure of such mineral interest shall be within the discretion of the board of county commissioners: Provided further, that in all cases where the aggregate assessed valution of such real estate subject to sale herein is less than $10,000, the bringing of such action shall be within the discretion of the board of county commissioners. Said petition shall contain a description of each tract, lot or piece of real estate, subject to the provisions of this act, including, if in a city of the first or second class, the street number or location, and stating, as far as practicable, the amount of taxes, charges, interest and penalties, chargeable to each tract, lot or piece of real estate, and the name of the owner, supposed owner, and party having or claiming to have any interest therein or thereto, and giving the year such property was sold for delinquent taxes under the provisions of section 79-2302 of the General Statutes Supplement of 1947 or any amendments thereto, together with a prayer that the court determine the amount of taxes, charges, interest and penalties chargeable to each particular tract, lot, or piece of real estate, and the name of the owner or

party having any interest therein, and that the court adjudge and decree the amount so found due to be a first and prior lien upon such property, and that the same be sold at public sale for the satisfaction of such lien, costs, charges and expenses of the proceedings and sale, and other necessary relief. Said petition shall be filed in duplicate and a copy delivered forthwith by said clerk to the county treasurer, who shall thereafter accept no payments of taxes upon the real estate included in said petition except as provided in this act. Thereupon, summons shall issue and shall be personally served or publication made as provided in other cases under the code of civil procedure, but in the event service is made by publication, the notice, in addition to the requirements prescribed by the code of civil procedure, shall contain a description of the real estate.

(General Statutes of Kansas, 1949)